



# COLORADO RIVER INDIAN TRIBES

## *Colorado River Indian Reservation*

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May 1, 2014

### **Via U.S. Mail and Email**

Dr. Thomas Gates  
Environmental/Cultural Resources Specialist  
California Energy Commission  
1516 Ninth Street (MS 40)  
Sacramento, CA 95812-5512  
Email: Thomas.Gates@energy.ca.gov

Re: **Draft Tribal Consultation Policy**

Dear Dr. Gates,

The Colorado River Indian Tribes (CRIT) offer the following comments on the California Energy Commission's draft Tribal Consultation Policy. As you know, CRIT is a federally recognized Indian tribe and has participated as an intervenor in two CEC siting proceedings (the Blythe and Palen Project Amendments). As such, CRIT has a unique perspective on the effectiveness of current CEC tribal consultation policies and the potential impacts of the draft Tribal Consultation Policy. CRIT looks forward to working with you to revise the draft policy to better effectuate the government-to-government consultation requirements established by Executive Order B-10-11.

To provide specific suggestions and comments on the draft policy, we prepared a redline document, which is attached. Draft language is provided where appropriate; more general questions and concerns are provided in comment bubbles.

Three overarching concerns merit additional attention. First, Executive Order B-10-11 specifically requires *government-to-government* consultation. However, the CEC siting proceedings regulations, as currently interpreted and applied by the Commission and CEC Staff, are in conflict with this requirement. CRIT Tribal Council is not permitted to discuss pending siting applications in a government-to-government consultation setting with Commissioners, particularly given CRIT's status as an intervenor in siting proceedings. 20 C.C.R. § 1216; Gov't Code § 11430.10 et seq.

CRIT understands that the prohibition on ex parte communication engendered in these regulations and statutes is intended to meet goals related to transparency and open government. However, a middle ground must be achievable; in order to recognize the Tribes' status as sovereign nations, the CEC must work to promulgate special regulations permitting effective and respectful communication between tribal governments and the Commission. Such efforts are necessary to effectuate the intent of Executive Order B-10-11.

Dr. Thomas Gates  
May 1, 2014  
CRIT's Comments on Draft Tribal Consultation Policy

In addition, during the April 21, 2014 workshop to discuss this draft policy, CEC Staff indicated that it was unable to discuss specific projects with CRIT due to the bar on ex parte communication. This interpretation was also expressed by CEC Staff Counsel during the Blythe proceeding. In stating that *CEC Staff* cannot communicate with CRIT, CEC Staff is misinterpreting applicable statutes and regulations. The current bar on ex parte communication applies to communication between parties and *the Commission*; on its face, it does not apply to communication between CEC Staff (a party to siting proceedings) and other parties. 20 C.C.R. § 1216; *see also* Public Participation in the Siting Process: Practice and Procedure Guide, Chapter 7. Indeed, it is clear that CEC Staff and the Applicant/Petitioners enjoy frequent communication throughout siting proceedings. To the extent CEC Staff rely on additional statutes, regulations, or policies to support their contention that communication between Intervenor and CEC Staff is prohibited, CRIT requests that CEC Staff provide such support to CRIT for its review. While communication between CEC Staff and CRIT cannot fulfill the government-to-government consultation requirement, such informal communication is nevertheless important.

Second, CRIT urges CEC Staff to better address confidentiality concerns in the draft policy, particularly with respect to siting proceedings. Currently, CEC Staff interprets its own regulations to prohibit Tribes from designating as confidential culturally sensitive material unless such material is otherwise protected from disclosure by federal or state law. Therefore, unless the material relates to the specific location of archaeological sites, CEC Staff has refused to recognize an application for confidential designation. While the Commission has applied a more flexible interpretation on a case-by-case basis, the CEC would encourage more effective government-to-government consultation and the "open and free exchange of information" envisioned by the California Natural Resource Agency Tribal Consultation Policy if more protective confidentiality provisions were developed as part of this draft policy.

Finally, CRIT urges the CEC to include an enforcement mechanism in its policy. As described above, the CEC has not met the mandates of Executive Order B-10-11 under its existing policies, and it is unlikely that compliance will improve unless Tribes can enforce the new policy. Even an internal appeal process, whereby Tribes could voice their implementation concerns to the California Natural Resources Agency, the Commission, or another oversight body could help ensure that the good intentions of this policy are not ignored.

CRIT looks forward to working with the CEC and its Staff to revise the draft policy in a manner that promotes true government-to-government consultation. *CRIT also requests that CEC Staff provide us with advance notice of any CEC action to finalize the draft tribal consultation policy.* Should you have any questions regarding these comments, please contact Rebecca Loudbear in the CRIT Office of the Attorney General ([rloudbear@critdoj.com](mailto:rloudbear@critdoj.com) or (928) 669-1271).

Sincerely,



Dennis Patch  
Chairman, Colorado River Indian Tribes

cc: Tribal Council

The purpose of this policy is to fulfill the California Governor's Executive Order 8-10-11 and the Resources Agency tribal consultation policy to ensure effective government-to-government consultation between the California Energy Commission (Energy Commission) and tribal entities to further the Energy Commission's mission and to provide meaningful tribal input into the development of regulations, rules, policies, plans, and activities that may affect tribal communities.

**WHEREAS** Governor Brown signed Executive Order 8-10-11 on September 19, 2011, directing State agencies and departments, including the Natural Resources Agency (Resources Agency) and the Energy Commission, to engage in effective government-to-government cooperation, collaboration, communication, and consultation with tribal entities concerning the development of legislation, regulations, rules, and policies on matters that may affect tribal entities.

**WHEREAS** the Resources Agency has adopted a Final Tribal Consultation Policy (dated November 2012) that implements Executive Order 8-10-11 by:

- recognizing tribal sovereignty over their territories and members;
- acknowledging that tribes and tribal communities possess distinct cultural, spiritual, environmental, economic and public health interests and unique traditional cultural knowledge about California resources;
- recognizing tribal interests concerning various kinds of state resources and the agency's responsibility for managing the state's natural, historical and cultural resources;
- defining effective government-to-government consultation as open, inclusive, regular, collaborative and implemented in a manner that is respectful, shares responsibility and provides for the free exchange of information concerning Resources Agency regulations, rules, policies, programs, projects, plans, property decisions and activities; and
- identifying specific actions as follows:
  1. Outreach: identify tribal government and community (entities) contacts early in the project planning process, invite tribal entities to participate in open dialogue, and exchange information per established mechanisms and do so in a repeated manner as appropriate.
  2. Tribal Liaison: establish department tribal liaison(s) that, on behalf of a respective department, will act as central points of contact for tribal entities. The tribal liaison's role is to ensure that department outreach and communications are consistent with the Resources Agency's Tribal Consultation Policy. Tribal liaisons are also to develop ongoing and regular communication with tribal representatives.
  3. Tribal Liaison Committee: serve on the committee of department tribal liaisons, established to function on a regular basis for the purposes of coordinating agency-wide tribal consultation efforts.
  4. Access to Contact Information: work with the Native American Heritage Commission (NAHC) to maintain a contact list of tribal entities.

5. Training: provide training that assists departments in implementing tribal consultation policy.

**THEREFORE** the California Energy Commission (Energy Commission) adopts the following Tribal Consultation Policy that:

1. Identifies the unique mission of the Energy Commission as guided by the Warren-Alquist Act, Rules of Practice and Procedure & Power Plant Site Certification Regulations (Regulations) and the needs of the various actions<sup>iv</sup> in which the Energy Commission engages;
2. Identifies the Energy Commission Tribal Liaison and other Assistant Tribal Liaisons;
3. Affirms Energy Commission Tribal Liaison participation in the Natural Resources Agency Tribal Liaison Committee;
4. Outlines the Energy Commission's 10-Step tribal consultation process;
5. Provides mechanisms for exchanging confidential information;
6. Stipulates docketing and public disclosure of Energy Commission tribal communications;
7. Suggests ways for fostering long term relationships; and
8. Lists applicable training opportunities that will assist Energy Commission personnel in implementing the Energy Commission Tribal Consultation Policy.

#### ENERGY COMMISSION MISSION, DIVISIONS AND RELATED ACTIONS

The Energy Commission is the state's primary energy policy and planning agency. Created by the Legislature in 1974 and located in Sacramento, six basic responsibilities guide the Energy Commission as it sets state energy policy:

- Forecasting future energy needs;
- Promoting energy efficiency and conservation by setting the state's appliance and building efficiency standards;
- Supporting public interest energy research that advances energy science and technology through research, development and demonstration programs;
- Fostering the development of renewable energy resources and alternative renewable energy technologies for buildings, industry and transportation;
- Licensing thermal power plants 50 megawatts or larger;
- Planning for and directing state response to energy emergencies.

The Energy Commission mission is implemented through six divisions and two other key units, that can have little, some, or much reasonable cause to consult with tribal entities. These organizational units are listed below:

1. Commissioners
2. Executive Office
3. Electricity Supply Analysis Division

4. Energy Research and Development Division
5. Efficiency Division
6. Renewable Energy Division
7. Fuels and Transportation Division
8. Siting, Transmission and Environmental Protection Division.

The following list provides examples of Energy Commission actions that **could require tribal consultation**:

- development of regulations, rules, and policies
- development of programs
- development of local, regional or statewide plans
- environmental review
- power plant siting and compliance activities

#### **ENERGY COMMISSION TRIBAL LIAISON AND ASSISTANT TRIBAL LIAISONS**

The Energy Commission Tribal Liaison position shall be vested in the Deputy Director of Siting, Transmission, & Environmental Protection (STEP) Division.

The STEP Deputy Director may designate an Assistant Tribal Liaison from among the STEP Division staff. The other Deputy Directors from the divisions listed above are required to designate Assistant Tribal Liaisons from among their respective staff. In the absence of a designation, the Deputy Director of the respective division will assume the Assistant Tribal Liaison responsibility.

Tribal entities may choose to become interveners in the Energy Commission energy facility siting process, and if selecting to assume an intervening role, such tribal entities will coordinate with the Public Adviser's Office. Contact information for the Energy Commission Tribal Liaison, Assistant Tribal Liaison(s), and the Public Adviser's Office are provided in Appendix 1.

The Energy Commission Tribal Liaison shall coordinate among the Assistant Tribal Liaison(s) by holding quarterly meetings for the purposes of sharing information, discussing project-specific tribal issues, planning tribal energy summits, preparing energy commission tribal issues training venues, and conducting "lessons learned" exercises.

#### **ENERGY COMMISSION TRIBAL LIAISON PARTICIPATION IN NATURAL RESOURCES AGENCY TRIBAL LIAISON COMMITTEE**

The Energy Commission Tribal Liaison will be the initial point of contact for participating in the Natural Resources Agency Tribal Liaison Committee. It is the Energy Commission Tribal Liaison's responsibility to fully participate, be aware of, and attend Natural Resources Agency Tribal Liaison Committee meetings, forums and functions. The Energy Commission Tribal Liaison may delegate participatory responsibility to another Assistant Tribal Liaison when other duties or circumstances prevent the Energy Commission Tribal Liaison's participation.

**Commented [A1]:** The policy should specify when consultation is required, tied to actions that have the potential to impact Tribes or cultural resources.

**Commented [A2]:** This section should better spell out what the Tribal Liaison is expected to do, and that meetings with the Tribal Liaison are not government-to-government consultation.

**Commented [A3]:** Tribal consultation during siting proceedings must be addressed in a more comprehensive manner; see the last additional section.

**Commented [A4]:** This document should consider how Tribes might be involved in these discussions, particularly for the lessons learned. It is important for the CEC to obtain feedback from the Tribes, rather than to rely exclusively on internal assessments.



#### ENERGY COMMISSION'S 10-STEP TRIBAL CONSULTATION PROCESS

The Governor's Executive Order B-10-11 and the Resources Agency Tribal Consultation Policy require tribal consultation to be initiated when state agencies engage in legislation, regulation, rules, policy, programs, projects, plans, property decisions and activities. However the majority of actions that the Energy Commission engages in concern actions related to projects that must be compliant with the California Environmental Quality Act (CEQA). The following 10-step process provides an outline for generally processing tribal consultations but should be closely followed should an Energy Commission Division engage as a lead agency in actions that aim to fulfill CEQA requirements related to the processing of Environmental Impact Reports, Mitigated Negative Declarations and Negative Declarations.

The following 10-step process outlines the steps to follow for achieving effective consultation.

1. Determine the Energy Commission Level of Effort for Initiating/Conducting/Furthering Tribal Outreach/Consultation
2. Assemble and Send to the Native American Heritage Commission a Request to Check the Sacred Lands File and Provide a Current List of Tribal Entities Interested in the Project Area
3. Receive and Review the Native American Heritage Commission's Response
4. Assemble and Mail an Energy Commission "Request to Consult" Letter to Tribal Entities.
5. Research Tribal Entities and Related Cultures
6. Follow Letters with Phone and Email Outreach
7. Document Energy Commission Consultation Efforts and Tribal Responses
8. Follow-up on Any Tribal Requests
9. Call Again Half-way through the Process or in Advance of a Project Milestone, Decision Point, or Prior to Comment Deadlines on Energy Commission actions regarding Regulations, Rules, Policies, Programs, Projects, Plans, Property Decisions and Activities
10. Summarize Energy Commission's Tribal Consultation Efforts

#### INFORMATION CONFIDENTIALITY

During the course of collaboration and communication, Energy Commission staff and tribal entities may have the need to exchange confidential information. Information exchange is a two-way function. The Energy Commission may have confidential information, such as applicant cultural resources reports that tribal entities may wish to access and on which they may wish to comment/peruse. Tribal entities may have confidential information, such as cultural resources records and oral history transcripts, that Energy Commission staff may wish access, review, and use in their decisionmaking to peruse. Pending any other legal regulation, code, or agreement, Energy Commission staff will condition and document transmission of confidential information that Energy Commission staff provide to, or receive from, tribal entities by means of a Confidential Information Non-Disclosure Agreement specifically tailored to cover such transmissions. Tribal entities may have comparable agreements that may be used in lieu of the Energy Commission Agreement template, subject to Energy Commission legal review.

**Commented [A5]:** This language must indicate that these steps are mandatory for all actions that potentially impact Tribes or cultural resources, and enforceable by the Tribes if not accomplished, even if by an internal procedure.

**Commented [A6]:** What will this determination be based on? Who will be responsible for making this determination? If there is a potential impact to Tribes or cultural resources, 100 percent effort should be required.

**Commented [A7]:** This list should specify that CEC members with sufficient decisionmaking authority over the project, not just lower level staff, conduct consultation. Often, this will require meeting with the Commissioners, rather than CEC Staff.

**Commented [A8]:** The most important aspect of consultation is missing from this chart. Consultation is *not* simply a set of steps to check off. Instead, the CEC must actually take into account any responses from Tribes and use that information in its decisionmaking. Simply documenting consultation efforts is not sufficient.

**Commented [A9]:** In particular, the CEC should be required to respond, in writing, to any substantive comments received from Tribes, not just "Tribal Requests."

**Commented [A10]:** This summary should include feedback from Tribes. The public and final decisionmakers should be aware whether affected Tribes consider the consultation to be adequate.

**Commented [A11]:** As noted above, consultation must involve CEC decisionmakers, not just staff.

**Commented [A12]:** What does "pending" mean in this context? Do you mean subject to?

**Commented [A13]:** As discussed below (under siting procedures), the CEC Staff interpret the current regulations to prohibit certain confidential designations in CEC proceedings. These regulations must be changed to ensure the purpose of this consultation policy can be effectuated.

#### DOCKETING AND PUBLIC DISCLOSURE OF ENERGY COMMISSION TRIBAL COMMUNICATIONS

The following project-specific consultation information will be docketed:

- The Energy Commission letter to NAHC that requests the list of tribal entities interested in the project area and Sacred Lands File check.
- The NAHC response letter.
- All letters sent to listed tribal entities that provide requests to participate in project consultation.
- Any letters from non-listed tribal entities requesting to participate in project consultation.
- Any Energy Commission response letters to non-listed tribal entities, requesting to participate in project consultation.

#### JOINT STATE AND FEDERAL TRIBAL CONSULTATION COORDINATION

Projects that are within Energy Commission regulatory authority may also involve other federal and state agencies such as the Bureau of Land Management (BLM), Department of Energy (DOE), the Western Area Power Administration (WAPA) and the California Department of Fish and Wildlife. Each agency has its federal or state regulatory authorities, laws, regulations and policies, including tribal consultation orders, memos and policies for which the respective federal agencies must comply. Coordination among federal and state agencies can be challenging because 1) the federal agencies are only required to consult with federally recognized tribal governments within the Government-to-Government framework, 2) because federal agencies are required to comply with the National Environmental Protection Act and the National Historic Preservation Act and these requirements require regulatory review timelines of greater duration than state equivalent regulatory processes and, 3) because, unlike the state, federal agencies have a fiduciary responsibility to protect tribal trust resources and interests. Consistent with DOE tribal government consultation policy Section VII, that calls for DOE – State communication and cooperation, the Energy Commission will consider the following set of activities in order to facilitate effective communication and cooperation with federal and state agencies that have a nexus with Energy Commission actions.

- Early and ongoing interagency communication
- Coordination of tribal contact lists
- Joint tribal consultation meetings when feasible and acceptable to Tribes.

However Energy Commission consultation activities should not be construed by federal agencies to singularly fulfill federal tribal consultation responsibilities, and federal agency consultation activities should not be construed by the Energy Commission to singularly fulfill state tribal consultation responsibilities. There may be Energy Commission actions where the agencies determine that agency-specific and potentially duplicative consultation efforts are in the best interest of the Energy Commission or federal or other state agencies.



## FOSTERING LONG TERM ENERGY COMMISSION / TRIBAL RELATIONSHIPS

Regardless in addition to project-by-project consultations, the Energy Commission wishes to foster long term positive relations with tribal entities. In order to foster long term relations, the Energy Commission may engage in the following activities.

- Convene short term tribal task forces
- Host or co-host annual State-Federal-Tribal energy summits
- Enter into agreements with Tribes to tailor tribal and Energy Commission processes that further facilitate consultations, information exchange, technical assistance, and funding

## ENERGY COMMISSION TRIBAL CONSULTATION TRAINING

From time to time Energy Commission staff will benefit from training venues and forums that may enhance Energy Commission staff performance per this policy. Such trainings may include the following:

- Various "Tribal Consultation" trainings provided by other federal or state governments, or private sector training institutions,
- Tribal cultural resources, sacred sites and traditional cultural property training, and
- Energy Commission generated Tribal trainings.

## TRIBAL CONSULTATION DURING THE ENERGY FACILITY SITING PROCESS

CRIT recommends that a separate section be added to address the numerous issues that occur during tribal participation in siting proceedings. This section should address:

- The ability of Tribes to intervene in CEC siting proceedings and retain the right to consultation. Currently, CEC Staff interprets CEC regulations to preclude Tribes from both participating as intervenors and being afforded all consultation rights. Tribes should not be put in the position of having to make a choice between procedural rights.
- Confidentiality concerns during CEC proceedings must be addressed. For instance, Tribes should be able to easily designate as confidential testimony on cultural resources containing sensitive information, without the need for a separate, special ruling by the Commission. Confidentiality should apply to all sensitive information, at the discretion of Tribes, independent of whether the information relates to the location of specific sacred sites.
- The siting process contains timelines that do not afford adequate time for consultation. To help address this issue, Tribes should be involved from as soon as an Application for Certification is submitted.
- The respective roles of CEC Staff, Commissioners, and the Public Advisor's Office during siting proceedings.
- The role of tribal consultation when the CEC is applying and/or enforcing Conditions of Certification.

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<sup>1</sup> Governments have many types of relations: with constituents, businesses, sub-governments, supra-governments, and other governments. The federal government recognizes tribes as other governments or sovereign self-determining entities with dependent nation status. This recognition, echoed in California State Policies, is also applied to the many federally recognized and un-recognized tribes located in California. The phrase "government to government" in the strictest sense, evokes a relationship between separate but equal governmental entities. Therefore the evocation of a "true, meaningful or effective" government-to-government consultation would be a consultation where equivalent persons of position with vested decision-making authority participate. Meetings held among persons of disparate positions of authority can still be useful for information exchange, or initial outreach. The Energy Commission government-to-government tribal consultation requirement cannot be abrogated or delegated to any third parties such as applicants, owners, loan or grant recipients or consultants. Instead of delegating the definition of government to

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government consultation to a footnote. This section should be expanded on, specifically required of the CEC, and enforceable by Tribes.]

<sup>iii</sup> The Native American Heritage Commission provides consultation lists that include tribal governments, tribal organizations and tribal individuals. Various state legislation, regulation, policy and guidelines refer to tribal governments, tribal organizations or tribal individuals by various terms. For the purposes of this policy "tribal entities" includes the following: tribes, tribal governments, Native American tribes, California tribes, California Indian tribes, California Native American tribes, federally recognized tribes, non-recognized tribes, California tribal communities, tribal communities, tribal consortia, Native American Non Governmental Organizations, California Native Americans, California Indians, Native Americans, Indians, and tribal people.

<sup>iii</sup> The Resources Agency's policy defines department as "any department, board, commission, council or conservancy subject to [gubernatorial] executive control."

<sup>iv</sup> "Actions" is defined herein as the development of legislation, regulations, rules, policies, programs, development of local, regional, or statewide plans; property decisions, granting of funds; and certification, amending, or compliance monitoring of energy facilities.